LEGAL CHALLENGES FOR SMALL JURISDICTIONS IN RELATION TO PRIVACY, FREEDOM OF INFORMATION AND ACCESS TO JUSTICE[*]

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Introduction

This paper provides a commentary upon three matters that provide legal challenges for small jurisdictions – privacy, freedom of information and access to justice. As examples of small jurisdictions, I have taken the small island countries of the South Pacific of Cook Islands, Fiji Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. These are all English speaking countries of the South Pacific which share common legal traditions inherited originally from England, and in the context of this paper I refer to them as 'the small island countries of the South Pacific.' I will, therefore, not be referring to the larger anglophone countries of the South Pacific, such as Australia, New Zealand and Papua New Guinea, except by way of comparison and background. Nor will I be referring to the francophone countries of the South Pacific, such as French Polynesia, New Caledonia, Wallis and Futuna, which have a different legal tradition.

The Right to Privacy

The desire to be left alone, to be able to do things without other people knowing about them, unless one wishes them to know, is a desire which is very much part of human nature. For this reason when the nations of the world agreed at the end of World War II to proclaim the Universal Declaration of Human Rights in 1948 they included in that Declaration of Human Rights the following:

> *Article 12*
> *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

Likewise when the countries of Western Europe decided to form the European Economic Community, which later became the European Community, and in 1950 signed the European Convention for the Protection of Human Rights and Fundamental Freedoms, they affirmed the right to privacy as follows:

> *Article 8*
> *Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

One might have expected that when in the 1960s and 1970's written Constitutions were drawn up to provide for the independence of the British, Australian and New Zealand dependencies in the South Pacific, that the provisions inserted in these Constitutions to recognise the fundamental rights and freedoms of the peoples of these countries would have included amongst the rights and freedoms so recognised, the right to privacy. But this did not happen.

Although the Constitutions which provided for the independence of Fiji in 1970, Kiribati in 1979, Solomon Islands in 1978, Tuvalu in 1978 and Vanuatu in 1980 recognised, in s9, s9, s9, s9 and art 5(1) respectively, the right of a person not to be subjected to a search of his person or property without his consent, they did not specifically refer to any more general right of privacy. When the Constitution of Cook Islands which granted self-governance in 1965 was amended in 1981 to provide for fundamental rights and freedoms, which had been omitted in 1965, there was no mention of any right to privacy. The Constitution of Nauru which provided for the independence of that country in 1968 did contain in a prefatory section, (art 3) a reference to the right of a person to 'respect for his private and family life,' but this was subsequently held by the Supreme Court of Nauru to be only an introductory provision and not to provide a substantive right enforceable by the Court.[1]

It was not until a very comprehensive review was undertaken in 1996, of the Constitution of Fiji Islands, that a recommendation was made that the Constitution of Fiji Islands should include recognition of a right to privacy: The Fiji Islands; Towards A United Future, Report of the Fiji Constitution Review Committee.2 This recommendation was accepted, and when the Constitution was re-enacted in 1997, it contained a section recognising the right to privacy:

> *Section 37*
> *Every person has the right to personal privacy, including the right to privacy of personal communications.*
> *The right set out in subjection (1) is subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society.*

It is now necessary for the Government of the Fiji Islands to determine what measures should be taken to protect the right of all persons to their privacy that are reasonable and justifiable in a free and democratic society. In other small island countries, of the South Pacific, although there is no constitutional recognition of a substantive right to privacy it is only a matter of time before a claim to such protection is made.

Such protection is likely to be sought firstly because already in most such countries government agencies have commenced the collection and storage on computers of a great deal of information relating to individuals. The opportunities and possibilities of access to such information by a larger and larger number of people and for a larger number of purposes is now much greater than before. Secondly, although the use of sophisticated electronic and optical devices by law enforcement agencies is not very extensive in the South Pacific region yet, it is only a matter of time before the increasing warfare against drug-trafficking and money-laundering will require the more frequent use of such equipment. Thirdly, and on rather a different plane, the following and shadowing of a person, either with or without talking, for the purposes of harassment, is conduct which is known to the police of most small island countries of the Pacific. Fourthly, and on a different plane again, there has been concern in recent years at the way in which politicians in parliament, and reporters in newspapers and on radio and television, reveal private details of individuals. All of these represent various methods of interference with privacy.

There are essentially two ways of approaching this interference with privacy. One approach, is the general approach of prohibiting excessive or unreasonable intrusions into a person's privacy except when permitted by that person or authorised by law. This approach leaves it for the courts to determine what is an excessive or unreasonable interference with privacy. It is the approach that has been adopted in some

Canadian provinces, for example, British Columbia and Saskatchewan. On the other hand, although both Australia and New Zealand have enacted legislation which is called a Privacy Act, that is, the Privacy Act 1958 (Cmth) and the Privacy Act 1993 (NZ), in fact they deal mainly with a certain aspect of it, that is, information privacy, the privacy of personal information stored manually or on computers (see below), and are examples of a second, and more particularised approach to the protection of privacy.

This second approach is a more specific or particularised approach; that is, to enact legislation that deals with those specific forms of intrusions into privacy that have caused most difficulties and public concern. Thus in some neighbouring countries legislation has been enacted which regulates or prohibits the following specific forms of interference with privacy:

interception of telephone conversations, for example, Interception of Communications Act 1985 (UK); Telecommunications (Interception) Act 1996 UK;
• listening in to private conversations for example, Listening Devices Act 1969 (NSW); Listening Devices Act 1969 (Vict); Listening Devices Act 1971 (Qld); Listening Devices Act 1972 (SA); ss 14-29 Misuse of Drugs Amendment Act 1978 (NZ); ss 4A, 4B New Zealand Security Intelligence Service Act 1969 (NZ); Part I A Crimes Act 1961 (NZ);
• broadcasting of sporting events from neighbouring property: s 115 Broadcasting and Television Act 1156 (Cmth);
• publication of photographs taken to identify persons: s 52 Private Investigators and Security Guards Act 1974 (NZ);
• harassment of a person: s1 Protection from Harassment Act 1997 (UK);
• inaccurate recording or misuse of information stored manually or on computers: Data Protection Act 1998 (UK); Privacy Act 1988 (Cmth); Privacy Act 1993 (NZ);
• publication of personal information which is not in the public interest or for the public benefit: s 15 Defamation Act 1974 (NSW); s 15 Defamation Act 1957 (Tas); s 6 Defamation Act 1901 (ACT).

The challenge for small island countries of the South Pacific is to determine which approach they will adapt with regard to the protection of privacy. The issue which faces Fiji Islands immediately, and which will face other small island countries of the Pacific in the foreseeable future, is: should one try to deal only with those particular forms of interference with privacy that have become most pressing, that is those that are most apparent and most objectionable, or should one try to tackle the problem on the broad front with a general attack against all unreasonable or excessive interference with privacy, leaving it to the courts to determine what they consider to be unreasonable or unwarranted or excessive interference with the privacy of individuals?

In those countries that have Law Revision Committees or Commissions (see later), this is clearly an appropriate topic for their consideration. In countries which do not have such Committees, an *ad hoc* committee drawn partly from government and partly from the private sector, could, and I would suggest should, be set up to assist the law drafts persons. This is not a matter that should just be left to legal draftspersons. It involves everybody, and so a body reflecting the views of the public, as well as of the government, should be established to discuss and determine the most suitable approach to adopt for the control of interference with privacy.

Before concluding this section, I would like to mention two particular aspects of privacy that are causing serious concerns in the small island countries of South Pacific at the present time. First, there is the unlimited power of legislators to reveal private details of a person in the legislature with complete legal immunity. Whilst one may accept that legislators should have an unlimited power to say what they like about other legislators, who are present in the legislature and able to defend themselves, the same is not true of ordinary members of the public. The unlimited freedom of speech of legislators was a hard-earned right in earlier times in Britain, and one would not wish to say or do anything to reduce the effectiveness

of legislators in performing their proper task of making laws for the benefit of the country, and scrutinizing and calling to account the actions of the executive government for that purpose.

But when legislators extend their comments to describe the private lives of members of the public who are not members of the legislature or of the executive, then this can surely be only justified on the ground that it is for the public benefit or in the public interest. Attempts in the past to put some legal curbs on the utterances of legislators so for as they affect private individuals have failed. But that does not mean that this issue is one which small island countries of the South Pacific are not capable of solving in a way which is more just for individual members of the public than the present law. I would, therefore like to place it on the table for consideration.

The second aspect of privacy that is proving troublesome at present in some small island countries of the South Pacific is the privacy that is granted by legislation to off-shore banking by exempt or overseas companies. These companies are registered in a country but do not carry on business in the country, except with the permission of government. In order to attract a flow of overseas funds into the country, and to attract banking and commercial transactions, which could be made subject to duties and charges, some small island countries in the South Pacific, that is, Cook Islands, Nauru, Samoa and Vanuatu, have legislated to allow for companies carrying on business outside the country to be incorporated and registered inside the country. A principal attraction of this for overseas companies is that these countries of registration have very low or nil rates of taxation. A further attraction is that the legislation provides that the records of such companies are not subject to inspection by members of the public or by government administrators as records of other companies registered in the country are. No information about off-shore companies can be obtained without a court order. As a result there is no way, without such an, for membership of these companies to be known, nor the sources, nor the destinations, of their funds. Because of this, there has been much concern in recent times that some exempt companies in some small island countries are being used for the laundering of the proceeds of drug – trafficking and Mafia operations on the other side of the world. Very recently, that is, late 1999, several prestigious US banks announced that they had indefinitely suspended the transmission of funds to companies registered in Nauru and Vanuatu, for fear that they may be involved in the transfer of illegally acquired funds. If this trend increases it could cripple the operation of exempt companies, which would have serious repercussions for the economies of some small island countries of the South Pacific.

Here then is a problem relating to privacy, in small island countries of the South Pacific which is the opposite of the previous one; the problem is not of too much interference with privacy, but of insufficient interference. If the concept of exempt companies is not to be placed at great risk it is necessary to devise some means of checking the sources and destinations of overseas funds of exempt companies to ensure that they are legitimate. This has to be done by some body or bodies that will be respected by the international banking community, and I would like to place this aspect of privacy also on the agenda for urgent consideration in small island countries of the South Pacific.

Freedom of Information

The concept of freedom of information is quite a new one for small island countries, of the South Pacific. When Great Britain acquired the colonies of Fiji in 1875 and of Gilbert and Ellice Islands (now Kiribati and Tuvalu) in 1916 they became parts of Her Majesty's dominions and therefore became subject to the Official Secrets Act 1889, and its successor the Official Secrets Act 1911, enacted by the British Parliament. These prohibited the unauthorised disclosure of material by any Government employee. The legislation was expressly stated to apply anywhere in the Her Majesty's Dominion and in 1986 was held to be in force in Fiji.[3] These same Official Secrets Acts of the United Kingdom, being Acts of general application in force in England, also applied, under the terms of the Pacific Order 1893, to the British protectorate of British Solomon Islands, to British subjects and optants in the New Hebrides, until the

promulgation of the Official Secrets Joint Regulation, 1980, JR 15/1980, and also to the Gilbert and Ellice Islands Protectorate prior to 1916. The Cook Islands, Niue and Samoa which were dependencies of New Zealand, although not subject to this British legislation, became subject to the provisions of the Official Secrets Act 1951 of New Zealand, and Nauru became subject to the terms of Part VII of the Crimes Act 1914 of Australia, and these provisions likewise prohibited the disclosure by Government employees of information to unauthorised persons.

After World War II, however, the legal basis for a right to access to government information was laid, although for many years it remained dormant, unrecognised and unactivated. When all the countries of the world assembled to proclaim the Universal Declaration of Human Rights 1948 they declared a right to freedom of information:

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and import information and ideas through any media and regardless of frontiers.

Again when the countries of Europe drew up the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 they reaffirmed the right to freedom of expression:

> *Article 10*
> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

The exercise of this freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

When during the 1960's and 1970's written Constitutions were prepared to provide for the independence of Fiji (1970), Kiribati (1979), Nauru (1968), Solomon Islands (1978), Tuvalu (1978), Vanuatu (1980) and Western Samoa (1962), provisions were inserted recognising fundamental rights and freedoms which were modelled in the Universal Declaration and the European Convention. One would therefore have expected that those provisions would have contained recognition of the right to freedom of expression including freedom to seek receive and impart information. Some Constitutions did in fact do so, and included express recognition of the freedom of information (see Fiji (s 12), Kiribati (s 12), Solomon Islands (s 12), and Tuvalu (s 112)). Other Constitutions (see Nauru, (art 12), Vanuatu (art 5(1)) and Western Samoa (art 13(1)) recognised a right to freedom of expression without amplifying that it included a right to freedom of information. The provisions in the Constitutions of Fiji and Tuvalu were carried forward into the new Constitutions that were promulgated for these countries in 1990 and 1986 respectively. The Constitution of Tonga (art 7) retained recognition of a right to freedom of speech which had been included ever since the Constitution was first enacted in 1875. When the Cook Islands attained self-governing status in 1965 the Constitution that was enacted by the New Zealand Parliament did not include any fundamental rights provisions, but an amendment in 1981 by the Cook Islands Parliament included a right to freedom of expression without amplification to freedom of information. The Constitution of Niue did not contain any fundamental rights provisions when it was enacted in 1974, and it still does not do so.

Thus all the small island countries of the South Pacific, except Niue and Tokelau, contain provisions which recognise freedom of expression, and four of these expressly recognise freedom of information, that is, Fiji, Kiribati, Solomon Islands and Tuvalu. One might reasonably have expected that this would have stimulated some legislative and administrative movement in these countries to effectuate access to governmental information. But this has not happened.

It was only when the Constitution of Fiji Islands was subjected to a fundamental review in 1995/96 that it was accepted that a Freedom of Information Act should be enacted. Important recommendations in this regard were made by the Constitution Review Commission in its report, 'The Fiji Islands: Towards A United Future'.[4] This report recommended that the Official Secrets Act 1911(UK) should be replaced by an Official Information Act which should provide that information held by government should be made available to people, unless there was a good reason to refuse it, such as threat to national security, public order, economic stability, commercial transactions, and legal privilege. It was recommended also that individuals should have an opportunity to inspect and, if necessary, correct, personal information held about them by government.

These recommendations were accepted by the Parliament of Fiji Islands which provided as follows in the Constitution which it enacted in 1997 and which came into force on 27 July 1998:

> *Section 134*
> *As soon as practicable after the commencement of this Constitution, the Parliament should enact a law to give members of the public rights of access to official documents of the government and its agencies.*

In response to this constitutional directive, a draft Bill for an Official Information Act has now been prepared by the Ministry of Information of Fiji Islands and is being circulated for comment. It is to be expected that a similar initiative will be taken by other small island countries in the South Pacific. This is especially likely since the Commonwealth Law Ministers, in their meeting in Trinidad and Tobago, 5-7 May 1999, expressly resolved that countries of the Commonwealth should promote freedom of information and adopted a series of principles and guidelines to that end, and instructed the Commonwealth Secretariat to take steps to promote these principles and report progress at their next meeting.[5]

It is very important, for reasons that were recognised and articulated by the Fiji Constitution Review Committee, that this initiative to improve access to government information does fare well. A modern democracy cannot operate properly if people cannot know and judge accurately what the government is doing, and the reasons why it takes the decisions and actions it does, and this is necessary not only periodically at the time of elections, but continually throughout the year. Moreover many aspects of government today require participation and support by people, and that participation and support cannot fully occur unless people have a full knowledge of what is involved.

Small island countries of the South Pacific are not bereft of models and precedents to consider when preparing an Official Information Act. In 1982 such Acts were enacted for the Commonwealth of Australia (Freedom of Information Act 1982), Canada (Access to Information Act, Sc. 1980-81-82, C111) and New Zealand (Official Information Act 1982). In addition, similar legislation has been enacted in the Australian states: Freedom of Information Act 1982 (Vic), Freedom of Information Act 1989 (ACT), Freedom of Information Act 1989 (NSW), Freedom of Information Act 1991 (SA), Freedom of Information Act 1991 (Tas), Freedom of Information Act 1992 (Qld), Freedom of Information Act 1992 (WA).

These overseas models will no doubt make the preparation of legislation to improve access to governmental information in small island countries of the South Pacific much easier than if there were no

such models available. On the other hand it is very important that they are not just copied blindly and enacted without very careful awareness of the issues involved, and of the administrative and social context in which the legislation is to operate.

It is clear that in overseas countries some difficulties have emerged in the implementation of the Freedom of Information legislation (hereafter referred to as FOI legislation). It has not been all plain sailing. 'Discussion Paper No 59 Freedom of Information', produced by the Australian Law Reform Commission, draws attention to a number of difficulties in the operation of FOI legislation in Australia: lack of support from government departments; high fees that may be charged which serve to obstruct requests for information; confrontational positions that develop; difficulties in determining what information is to be disclosed; lack of adequate information management in departments and agencies; lack of continuing and focussed responsibility for oversight of operation of Act.[6] These difficulties are not likely to be any less in small island countries of the South Pacific.

Indeed, if anything, the difficulties and deficiencies that have been observed in the operation of the FOI legislation in Australia are likely to be more, not less, in small island countries of the South Pacific. It is important to recognise that the governments and public administrations of such countries have been operating since independence or self-governance in an atmosphere in which government is regarded almost as the private property of the governors – the ministers, and the public servants, and the management and staff of statutory bodies. Information and material, like other aspects of government, are regarded almost as belonging to the people in charge. Partly this is a result of the legacy of the Official Secrets Act 1910 (UK) and the Official Secrets Act 1951 (NZ) and Part VII Crimes Act (Aust). But partly also it is as a result of the way in which government tends to be regarded in small island countries of the South Pacific, where there is no long established tradition and awareness of the fact that in democracies governments must come, and governments must go, and where alternative professions and occupations are not so readily available, so that all the perquisites of office tend to be more important than they would be in more developed economies. Also, the administrations of government departments and agencies are in many small island countries in the South Pacific, small and not fully trained and the records of departments and agencies are not well kept. Moreover as a result of the Comprehensive Reform Programme, that has been recently introduced in some small island countries of the South Pacific, the numbers of staff in some departments of government have been drastically reduced.

All of this is not likely to make it easy to introduce an effective programme to improve access by the public to government held information. They highlight, I would suggest, the essential need for discussions with the government agencies that are likely to be most affected by FOI legislation before the draft legislation is prepared. If overseas experience is any guide, it is government agencies dealing with personal information relating to individuals that are likely to be most affected, that is, those dealing with pension funds, licensing of businesses and occupations, immigration, revenue collection, registration of births and deaths and law enforcement. Many of these may already have developed some processes for responding to inquiries for personal information, which may need to be strengthened, altered or expanded. Some, however, may not have done so, and it will be necessary to develop appropriate procedures for the management and disclosure of information.

In addition, there will be the other government agencies which do not deal with personal information, but, again if overseas experience is any guide, will be required to make available information relating to policies and principles, reasons for decisions taken, and statistical information in their possession. In the past they have previously made such information available to the public only as and when they wished, but under FOI legislation they will be expected to disclose these on a regular basis. This will obviously require the initiation and implementation of new procedures for the collection, storage and disclosure of the required information.

Before pen is put to paper to draft the legislation, it would be wise to ensure that the requirements of the law will be both desirable and effective. There needs to be thorough discussion with the management of each government agency to ascertain what kinds of information it is practicable and desirable for that agency to disclose to the public

It will obviously also be necessary for a person or body to be authorised to determine any disputes that may arise as to whether a particular piece of information that has been requested is, or is not, required by law to be disclosed. In some countries, for example, New Zealand and the Commonwealth of Australia, this has been placed in the hands of the Ombudsmen with power to make recommendations, which may be, and indeed have been, rejected by Ministers. Provision may be made however, as in New Zealand, for judicial review of Ministerial decisions. Other countries rely upon the courts, and another possibility, adopted in Queensland and Western Australia, would be a separate FOI Commissioner.

It is also clearly necessary that there be one person or body which has the overall responsibility of monitoring the effectiveness and appropriateness of FOI legislation. In countries which have a Ministry of Information, such as Fiji Islands, this ministry would seen to be the logical body to expect to carry out this task, but in most small island countries of the South Pacific, there is no such Ministry. In countries where a FOI Commissioner is established to determine disputes about the law of information, that person could well undertake the broader task of overseeing the implementation of the FOI legislation. It is very important, however, as overseas experience has shown, that some person or body is identified and given authority to ensure that there is full compliance with FOI legislation, and that any difficulties or deficiencies in its implementation are identified and rectified.

These then are the challenges that currently face the Fiji Islands, and which in the foreseeable future will face other small island countries of the South Pacific, as they confront the necessity of improving access to government information.

Access to Justice in Smaller Jurisdictions

Introduction

When the small island countries of the South Pacific came under the control of Britain, Australia and New Zealand, the controlling countries all established in the capital town a principal court with very wide jurisdiction. This was called the High Court or Supreme Court, and below they established a subordinate court, called a district or magistrates' court, was established in the capital town and in larger towns, with more limited jurisdiction to deal with minor civil and criminal matters. In some countries, that is, British Solomon Islands Protectorate, Fiji, Gilbert and Ellice Islands and New Hebrides, an additional subordinate court, called a native court, or island court, was established, with jurisdiction to determine civil claims and criminal prosecutions relating to indigenous people.

Although there was provision for appeals from decisions of the principal court, originally this appellate court was not situated within the country. For British Solomon Islands Protectorate, Gilbert and Ellice Islands, New Hebrides (British subjects and optants) appeals lay to the Supreme Court, later the Court of Appeal, of Fiji. For Cook Islands, Niue and Western Samoa appeal lay to the Supreme Court of New Zealand, and for Nauru appeals lay to the High Court of Australia.

The prosecution of criminal offences was in early times one of the responsibilities of the Attorney-General and the police and there was no provision for a public prosecutor. Nor was there provision for a public solicitor or for legal aid, although in New Hebrides a native advocate was appointed to represent New Hebrideans in land claims by Europeans.

Since independence the court structure has remained basically unchanged except that an appellate court

called the Court of Appeal, was established within the country to hear appeals from the principal court. In addition, a public prosecutor was established to take over responsibility for criminal prosecutions from the Attorney General in Fiji, Kiribati, Solomon Islands, Tuvalu and Vanuatu, and a public solicitor was established to provide legal assistance in Solomon Islands, Tuvalu, and Vanuatu.

These then are the bodies or institutions that exist to provide justice in the small island countries of the South Pacific today.

Accessibility of Courts

Obviously a very basic requirement of access to justice is the physical accessibility of the courts where justice is to be dispensed. In all small island countries of the South Pacific the principal court, that is, the High Court or Supreme Court, is located in the capital town on the main island. It has a registry there where documents can be filed, and also a court house where cases can be heard. In the larger countries, that is, Fiji Islands, Samoa, Solomon Islands, Tonga, Vanuatu, there is a registry of the principal court in one or two other larger towns, and a court house, but no resident judge. In the rural areas, and in many islands, there is neither registry nor court house, no resident judge and no visiting judge. Accordingly for people outside the capital town, and especially for those outside the main island, access to the principal court is both difficult and expensive.

More readily accessible are the subordinate courts – the magistrates' courts, and the island or local courts. These are to be found in the main towns in the more populated islands. But outside of these main towns and main islands, there is no courthouse or registry for magistrates' courts, island courts or local courts. The result is that in some islands, and in some populated areas of islands, there is neither magistrates' court, nor island court nor local court.

As mentioned earlier in the Introduction an appellate court to hear appeals from the High Court or Supreme Court is now established within of the each of the small island countries of the South Pacific except Tokelau. But the appeal judges who sit in this court are not drawn from within that country, but are selected from other small island countries of the South Pacific or from Australia or New Zealand. Consequently these courts of appeal do not sit all the time – only once or twice a year. If a case is decided in the High Court or Supreme Court which is wrong or unjust, this may not be able to be rectified for months. This can be serious, especially when a person has been committed to prison, and has to await an order from the Court of Appeal for his or her release.

Competence, Independence and Impartiality of Adjudicators

Access to justice obviously depends, not only upon the physical availability of courthouses and adjudicators, but also upon the quality of the adjudicators, and in particular upon their competence, independence, and impartiality. These are the three essential qualities, the verbal *troika*, which Justice Michael Kirby urged should be inscribed above the door through which every judicial officer enters to perform his or her work.[7]

As regards the judiciary of the superior courts – the High Court or Supreme Court and the Court of Appeal – there is normally no difficulty in this regard. Occasionally a conflict has arisen between the judiciary and the executive government, when an expatriate Chief Justice has made some unwise and injudicious statements which in a small jurisdiction can soon become widely know to the government and strongly resented by them, leading to moves to secure the removal of that judge. Also, in some small island countries of the South Pacific there is only one judge of the principal court, the Chief Justice, and there is no other judge, either to assist him, to advise him, to caution him, to support him, to deflect criticism of judicial decisions, or to complement or to dilute his personality or his expertise.

In many countries the judiciary in the superior courts are not totally indigenous to these countries, for example, Cook Islands, Fiji Islands, Kiribati, Nauru, Niue, Tonga and Tuvalu. This has the advantage of reducing possibilities of impartiality, but may be seen as reflecting adversely upon the independence and national status of the country.

In the subordinate courts – the magistrates' courts, and especially the island and local courts – there is a more serious and persistent problem of lack of impartiality, or apparent lack of impartiality. In smaller jurisdictions where there are very extended families it is often the case that a local justice or magistrate will be related by family or social ties to a party or a witness appearing before the court, and claims of bias can quite often arise.

National programmes for the training of adjudicators in subordinate courts have been commenced in most countries of the region during the last five years, largely through the initiative of the University of the South Pacific and of traditional aid donors of the region – Australia, Britain and New Zealand. More recently, in 1999, a regional programme for the continuing education of judiciary was launched at the University of the South Pacific, with the assistance of the United Nations Development Fund and the United Nations Office for Project Services, called the Pacific Judicial Education Programme, and it is hoped that this will improve still further the performance of judiciary in the small island countries of the South Pacific.

Paucity of Lawyers and Para-Legal Personnel

Not so long ago, the lack of degree qualified lawyers both in the public sector and in the private sector, was a serious problem in the small island countries of the South Pacific. Since the commencement of the law degree programme at the USP in 1994, and the emergence of the first law graduates at the end of 1997, this problem has reduced, and is steadily reducing. But it still remains. In Kiribati and Tuvalu, and outside the main islands in Cook Islands, Fiji Islands, Samoa, Solomon Islands, and Vanuatu, there are no lawyers in private practice. In Solomon Islands, Tuvalu and Vanuatu a public solicitor or public defender has been established in the main town, but there is no presence outside the main town.

One of the biggest challenges to justice is the lack or inaccessibility of police. In areas outside the main towns, except Fiji Islands, there is no resident police force. So if a crime is committed, or if a serious dispute erupts, there is nobody who can take action in the name of the state to apprehend the offenders or to prevent harm being caused to property or persons. Fortunately, in many areas in small island countries, chiefs and elders still are able to exert influence, and can provide the social control which the police cannot provide. But sometimes the member of persons involved is too large, or the feelings and passions aroused are too intense, or the perpetrators are too devious, for the chiefs and elders to take any effective action. Sometimes, also, the chiefs and elders may be active participants in the disorder. In these situations, the lack of readily accessible police force presents a very acute problem, and great damage and personal injury can occur before peace and order is restored.

Linked with, but separate from, these problems, are deficiencies in the prosecution of criminal cases. Frequently it happens that criminal prosecutions are never commenced against wrongdoers. Sometimes this is because of straight out administrative inefficiency on the part of the police or others responsible for prosecutions. Names and addresses of witnesses, briefs of evidence, or whole files get lost or overlooked and not fully processed. Prosecution files are put aside because they are too difficult or there are more pressing problems, and they are forgotten. Sometimes family, political or social influence is brought to hear, and a prosecution file is quietly set aside or lost, and never seen again.

Even when a prosecution is started, it may often fail. It is not unusual to find that the charge has not been properly drawn, or that there was no proper complaint on oath to provide a foundation for the charge. The charge may therefore be dismissed on a technicality regardless of the evidence that supports it.

Alternatively, evidence that is produced may not support the charge that has been filed, and either no attempt is made to seek approval to amend the charge, or approval for such amendment is sought, but refused.

Training programmes have been, and are being, provided, for police and prosecution personnel in many small island countries of the South Pacific, but there is still much to be done to ensure that justice is done to the victims of crime.

Lack of Ombudsman, Human Rights Commissions and Institutions to Protect Privacy and Freedom of Information

It is nowadays generally recognised that the rights of people extend beyond the legal rights that are recognised by the courts, and also that to provide full protection of rights, it is necessary to establish not only courts, but also other institutions which can protect these other rights. Access to justice thus requires not only access to courts, but also access to other institutions that supplement and complement the role of courts.

In the earlier sections of this paper, there was discussion about the lack of institutions in small islands of the South Pacific to protect the rights of privacy and of freedom of information, and there is no need to repeat this discussion here. Instead, I will concentrate in this section upon the provision, or lack of provision, in small island states of institutions to assist people to be treated reasonably and fairly by government. In many countries of the world it has been recognised that the establishment of independent bodies additional to the courts which can scrutinise the action of government is necessary to provide full access to justice. Two such institutions are an Ombudsman and a Human Rights Commission.

In Cook Islands, Fiji Islands, Samoa, Solomon Islands and Vanuatu an Ombudsman has been established. But in other countries of the region, for example, Kiribati, Nauru, Niue, Tonga and Tuvalu, there is no such institution. In Tonga a Government Complaints Committee under the chairmanship of the Attorney-General has recently been announced. Whether it will play the role of an Ombudsman is yet to be seen.

Funding for an Ombudsman has been, and still is a problem, for many small island countries. A government that is hard pressed to find money for its own projects is not likely to look with much favour on a request for funds to establish an institution, the main function of which will be to scrutinize and criticise its own operations. Accordingly difficulties of funding can affect both the initial establishment of an office of Ombudsman, and also its continuing operation.

Possible alternatives, apart from aid from external sources, are the establishment of an Ombudsman on a part-time basis only, or the establishment of a regional or sub-regional Ombudsman who could serve several smaller countries. A sub-regional grouping of Kiribati, Nauru and Tuvalu naturally suggests itself, and also Cook Islands and Niue. A sub-regional grouping of the two Polynesian countries of Samoa and Tonga would seem geographically feasible, but the long tradition of rivalry between the two countries, and the fierce national pride of each, renders such a grouping more difficult.

Likewise with a Human Rights Commission. A Human Rights Commission has been recently established in Fiji Islands as a result of a recommendation in the Constitution Review Committee. This recommendation was accepted and incorporated into the current Constitution, which came into effect on 28 July 1998. But in the other small island countries in the South Pacific there is no Human Rights Commission to help to ensure that the fundamental rights of human beings are not contravened by government.

Funding is likely again to be a serious problem for the establishment of such a body in other small island countries of the South Pacific. It may be that aid donors are willing to assist with the establishment of a

Human Rights Commission in each country. But if that is not possible the alternative of a regional or sub-regional Human Rights Commission is one which is worth exploring.

In the 1980's the Human Right Committee of LAWASIA, after extensive consultations throughout the South Pacific, proposed a draft Charter of Human Rights for the South Pacific, and this was published, together with an explanatory memorandum, in 1989.[7] Governments of the South Pacific have, however, shown little interest, and nothing positive has resulted from this initiative, or from the attempt in the 1990's by the Institute of Justice and Applied Legal Studies of the University of the South Pacific to revive interest in a regional Charter of Human Rights.

There are two major difficulties about a regional or sub-regional Ombudsman and Human Rights Commission. One is the national pride of each country which makes it difficult to accept that its own governmental institutions should be subject to scrutiny and criticism by a body from outside the country. The other is the great expense of travel between countries of the region: airfares in the South Pacific are very high, and good accommodation also is very expensive. There is obviously no point in establishing an Ombudsman or a Human Rights Commission on a regional or sub-regional basis, unless the contribution of each country to this will be significantly less than the costs of establishing such bodies on a national basis.

An alternative is to consider the establishment of these bodies in each country but on a part-time basis only, so that the salaries could set at a level which the country could afford. This is obviously not an ideal solution, but in some cases it is necessary to accept that half a loaf is better than no bread at all.

Lack of Law Revision Commission

Access to justice requires not only that courts and other bodies must be established to ensure respect for the rights of people, but also that the laws which are applied by such institutions are continuously appropriate to the circumstances of the people. The societies and economies of small island countries are continually undergoing change, partly as a result of developments outside the countries, partly as a result of developments from within, and it is important to ensure that the law is kept abreast of these developments.

This used to be considered to be one of the responsibilities of the Attorney-General, but in many countries it has been realised that the Attorney-General and his staff do not have the time to properly acquit themselves of this responsibility. In two small island countries of the South Pacific, as in Australia, New Zealand and Papua New Guinea, a permanent body has been established to take over this responsibility. In Fiji Islands and Solomon Islands a Law Revision Commission has been established on a part-time basis to review significant areas of law where it is felt that some change may be necessary in view of changes in society. The Law Revision Commission of Fiji Islands is currently undertaking a study of corruption – what forms it takes, and how extensive it is – with a view to considering some changes to the law to make the law more effective in controlling this evil which can cause so much damage and distortion in governmental administration and also in the private sector.

In the other small island countries in the South Pacific, that is, Kiribati, Nauru, Niue, Samoa, Tokelau, Tonga, Tuvalu and Vanuatu, no Law Revision Committee has been established. A full-time Law Revision Committee is unlikely to be able to be afforded without external aid, but a Law Revision Committee should be able to be established on a part-time basis, as in Fiji Islands, acting with the assistance of consultants in specialist areas, but nevertheless ensuring that any proposals provided by such consultants are appropriate to the circumstances of the individual country.

Conclusion

From what has gone before in this paper, it is apparent that there are a number of challenges facing small island countries of the South Pacific with regard to the protection of privacy, the freedom of information and access to justice. They are not insurmountable challenges, but they are serious and persistent, and it will require determination and perseverance to overcome them.

[*] This is a modified version of a paper delivered at the South Pacific Islands Regional Conference of the International Bar Association held at Mocambo Hotel, Nadi, Fiji Islands, 30 January – 2 February 2000.

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[1] *Jeremiah v Nauru Local Government Council, Nauru Law Reports*, 1969-82, Part A, p11.
[2] Parliamentary Paper No 34, 1996, paras 7141 – 7146.
[3] *Vosanibola v Reg* (unreported) Cr Ap 62/1986. I am indebted to Mr Feisal Haniff of Messrs Munro Leys of Suva for a reference to this case.
[4] Parliamentary Paper No 34 (1996), Recs 586-560.
[5] (1999) 25 CLB 560-573.
[6] ALRC, Sydney, May 1995, at 11.
[7] Hon Justice Michael Kirby, 'Commonwealth Bulletin – Chronicler of a Quarter. Century of Change': (1999) 25 CLB 8, 15.
[8] See (1992) 22 (3) VUWLR, at 99.